Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1993

CHRISTOPHER COZAD,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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110 pp

QUESTION PRESENTED

1) Whether the trial court's decision to sentence Christopher Cozad on the basis of an intent and capability to produce five kilograms of cocaine as opposed to the two kilograms sold, absent sufficient evidence to support this finding, coupled with the Court of Appeals' affirmance of that decision, constitutes a departure from the accepted and usual course of judicial proceedings and conflicts directly with the decision in *United States v. Foley*, 906 F.2d 1261 (8th Cir. 1990).

LIST OF PARTIES AND RULE 29.1 LIST

The parties to this case are the petitioner, Christopher Cozad, co-defendant Edwin Yeager and the United States of America as respondent.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Christopher Cozad, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals, Fifth Circuit, entered in the above-entitled proceeding on January 6, 1994.

OPINIONS BELOW

The opinion of the United States Court of Appeals, Fifth Circuit, entered on January 6, 1994, was unreported but is reprinted in the Appendix hereto, p. 1 infra.

JURISDICTION

The Court of Appeals' opinion was filed on January 6, 1994. Petitioner now invokes the jurisdiction of this Court pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Sections 2D1.1 and 2D1.1, Application Note 12, of the United States Sentencing Guidelines is set forth in Appendices F and G, respectively.

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS AND DISPOSITION IN COURTS BELOW

Christopher Cozad and co-defendant Edwin Yeager were indicted on November 6, 1992. The first count of the

indictment charged that the defendants knowingly conspired to distribute cocaine, and the second count alleged that defendants knowingly and intentionally possessed with intent to distribute two kilograms of cocaine. Mr. Cozad and his co-defendant pled guilty to both counts on March 3, 1993. On June 1, 1993, following a sentencing hearing at which there was live testimony, Cozad was sentenced to a term of imprisonment of 105 months as to counts 1 and 2 of the indictment, to be served concurrently.

B. STATEMENT OF FACTS

The only issue to be determined in this matter is whether the sentence imposed upon Mr. Cozad was improper because of the total lack of evidence to support the trial court's decision.

In its factual basis at the time of re-arraignment, the government alleged that an agreement was reached between co-defendant Yeager and a confidential informant to sell five kilograms of cocaine for $147,500.00. According to this factual basis, after being shown this money, Yeager allegedly stated his source would supply five kilograms on November 1, 1992, and then later allegedly informed the confidential informant that his source of the cocaine wanted to sell two kilograms on October 31, 1992, and three the following week.[1] During

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[1] The factual background in this section is set forth, complete with citations to the record, in petitioner's brief and reply brief to the Court of Appeals for the Fifth Circuit, reprinted as Appendices C and D. The transcript of the Sentencing Hearing also is reprinted in Appendix E attached.

the re-arraignment the district court inquired of the defendants if they had any questions to ask the Assistant United States Attorney in regard to the factual basis. Both appellants acknowledged and pled to the sale of two kilograms but disputed the sale of a total of five kilograms. The district court then agreed with the defendants that the amount of cocaine would be a matter for determination at and for sentencing.

A sentencing hearing was held on June 1, 1993, and the government called as its only witness DEA Agent Mark Kiger, who testified on direct examination that the confidential informant initiated the five-kilogram figure in a conversation with co-defendant Yeager. Agent Kiger stated that co-defendant Mr. Yeager, not Mr. Cozad, responded to this request by the confidential informant that he could provide five kilograms of cocaine. Kiger further testified on direct examination that there were recorded conversations between Yeager and the confidential informant in regard to the negotiations. Specifically, he stated that on October 26, Mr. Yeager, not Mr. Cozad, told the informant that he had five kilograms.

It is important to note, however, that at no time did the agent testify that Mr. Cozad stated anything about five kilograms on any tapes or was involved in any negotiations in regard to five kilograms. As a matter of fact, when Agent Kiger was specifically asked if Mr. Cozad, while he was at Mr. Yeager's residence with the confidential informant on October 31, 1992, participated in any decisions as to quantity, Agent Kiger replied: "I don't believe there was. I believe all that was discussed was whether the informant was going to be able to see the cocaine or not." Agent Kiger also testified that when

the original date for the production of cocaine was delayed until November 2, 1992, only two kilograms, not five, were to be delivered.

It is worthwhile pausing at this moment to emphasize that the government chose not to introduce any of the taped conversations between the confidential informant and either defendant or to call the confidential informant to testify. Any testimony in regard to the confidential informant only came from Agent Kiger.

Under cross-examination, Agent Kiger admitted that it was the confidential informant, and not either Yeager or Cozad who raised the sale of four or five kilograms in the confidential informant's initial conversation with Mr. Yeager, per the instructions to the confidential informant from the DEA. Agent Kiger further admitted that, in the first conversation with the confidential informant, Mr. Yeager stated that only a smaller amount, one or two kilograms was possible. Agent Kiger admitted that despite the presentation of $147,500.00 from the confidential informant to Mr. Yeager, money sufficient for a five-kilogram deal, the only amount sold on November 2, 1992, was slightly less than two kilograms.

Under further cross-examination Agent Kiger testified that Mr. Cozad was on three conversations taped by the federal government, one on October 31 (discussed above); one when the informant met at Mr. Yeager's house (which Agent Kiger testified was "virtually useless"); and one on November 2 generated by the DEA with the cooperation of Yeager. It was undisputed during Agent Kiger's testimony that in none of those

conversations were there any references to five kilograms. As shown above, in the October 31 conversation, there was no discussion of amounts. In the November 2 conversation (which was prompted by the DEA after Mr. Yeager had been placed under arrest and was cooperating), there also was no reference to an additional three-kilogram sale, despite the fact that Mr. Yeager was making the phone call at the specific instruction of the DEA. Agent Kiger testified: "No, this conversation just centered around how the money was supposed to get into Mr. Cozad's hands. That was the topic of the conversation."

Edwin Yeager also testified at the sentencing hearing. He stated that the confidential informant asked him if he thought he could get five kilograms and he told the confidential informant he did not know if he could do this. "I really don't know. And then we talked again, I said look I can get you one and then I can get you two if we ended up with . . . . "[2] Yeager testified that the greatest quantity that he knew co-appellant Cozad sold in the past was only one kilogram, and that the confidential informant "seemed like he always kept pumping up to get to five. I mean he took what he could get, but it just seemed like he kept pumping up to the five all the time." He stated that to keep the confidential informant "around," he told him he would see what he could do. However, according to Yeager, this was only for the purpose of keeping him around to keep the transaction for the one or two kilograms. In fact, Yeager testified that in the beginning he mentioned five kilograms to Mr. Cozad

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[2] Petitioner notes this is the end of Yeager's statement. Another question interrupted his answer. Appendix E, p. 55.

but Mr. Cozad said, according to Yeager's testimony, "No, no way, wouldn't do it and couldn't do it." In response to a question of whether there was ever any serious intent to sell five kilograms, Mr. Yeager testified: "Not at all, not at all." Yeager also testified that the DEA told him what to say during his telephone conversation with Mr. Cozad but that he did not say anything about additional kilograms of cocaine or when an additional deal could be culminated for kilograms over and above the two kilograms that had been sold.

Under cross-examination by the government Mr. Yeager consistently stated that he was not able to produce five kilograms despite the fact that the confidential informant kept asking for five kilograms continuously. "I wasn't going to give him five. I didn't have five. I had two. I gave him the two and that was going to be the end of the dealings with him."

Cozad testified in his own behalf at the sentencing hearing and stated that at no time did he ever have an agreement with anyone to deliver any cocaine over and above the two kilograms that were sold. He testified that he was not capable of producing and had no intent to produce any more cocaine than two kilograms.

Cozad's testimony also confirmed the DEA Agent's testimony that in the October 31 conversation, there was no discussion of amount of cocaine and that in the phone call between Yeager and Cozad, there was no mention of any sale beyond two kilograms.

REASONS FOR GRANTING THE WRIT

This Honorable Court should grant certiorari because the trial court and the court of appeals so misconstrued the evidence in this matter, or lack thereof, so as to constitute a departure from the accepted and usual course of judicial proceedings. Further, the decision by the court of appeals in this matter directly conflicts with that in *United States v. Foley*, 906 F.2d 1261 (8th Cir. 1990).

A. LACK OF EVIDENCE TO SUPPORT THIS DECISION

The court of appeals stated in this matter that "[t]he findings of intent, and, to a lesser extent, that of ability, are supported by the ample testimony regarding the negotiations for five kilograms." *United States v. Cozad*, No. 93-3423, p. 3 (January 6, 1994) (Appendix A, pp. 3-4). However, as the facts above show, there is simply no evidence showing that, at any time, Christopher Cozad had either the intent or the ability to make a sale of five kilograms. Indeed, the testimony and the evidence is to the opposite. There was no evidence that the confidential informant ever dealt with Cozad and agreed to make a sale of five kilograms. There also was no evidence that in any phone conversation involving Cozad there was any discussion, much less agreement, to make any sale over and above the two kilograms that were sold. Thus, the court of appeals as well as the trial court were clearly erroneous in finding sufficient evidence, much less ample evidence, to support the sentence at issue.

Section 2D1.1 of the United States Sentencing Guidelines controls the determination for the base offense level

for offenses to which Cozad pled guilty. Application Note 12 of the United States Sentencing Guideline Section 2D1.1 states: "[t]ypes and quantities of drugs not specified in the count of conviction may be considered in determining the offense level. See Section 1B1.3(a)(II) (Relevant Conduct)." Application Note 12 further states:

> In an offense involving negotiation to traffic in a controlled substance, the weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount. However, where the court finds that the defendant did not intend to produce and was not reasonably capable of producing the negotiated amount, the court shall exclude from the guideline calculation the amount that it finds *the defendant did not intend to produce and was not reasonably capable of producing*. (Emphasis added.)[3]

Appellant argues that the dearth of evidence that he intended to produce or was capable of producing more than the two particular kilograms that were sold is the basis for reversal of the lower court decisions in this matter.

The court of appeals stated that the testimony regarding the negotiations for five kilograms supported the intent prong of this test. However, the only testimony

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[3] This language was formerly included in Application Notes to United States Sentencing Guideline Section 2D1.4, which section was deleted effective November 1, 1992. At the same time the quoted language was inserted in Application Note 12 to United States Sentencing Guideline Section 2D1.1 Amendment 447, Amendments to Sentencing Guidelines.

regarding negotiations for five kilograms was a conversation between Edwin Yeager and the confidential informant, and at no time did petitioner ever participate in that conversation. Further, Edwin Yeager's unrebutted testimony at the sentencing hearing was that Cozad refused to participate in any sale of five kilograms, *i.e.*, "no way, wouldn't do it and couldn't do it." This hardly constitutes the "ample testimony" regarding negotiations for five kilograms that support intent.

The court of appeals found ability in two respects. First, the court found that Yeager's testimony that Cozad had been involved in at least one prior cocaine transaction was supportive of ability. *United States v. Cozad, supra*, p. 3 (Appendix A, p. 4). However, the testimony referred to by the court of appeals was that the greatest quantity of cocaine that Yeager knew Christopher Cozad to be able to "move" in the past was only one kilo. (Record on Appeal, Vol. 2, p. 22.) The court of appeals improperly extrapolated this testimony to mean that Cozad had the ability to make a sale not only of two kilos but also of three more on top of that. This reasoning is implausible.

The court of appeals then made a bootstrap argument that the production of the initial two kilos supported the finding that the defendants were able to produce an additional three more. This reasoning is without any basis and totally contrary to the evidence presented at the hearing.

Again, it is important to remember that the testimony of Edwin Yeager to the effect that he was only "puffing"

when he was discussing the five kilograms with the confidential informant was unrebutted. Just as important was the testimony by Yeager that Cozad said that he would not and could not produce five kilograms, as well as Cozad's testimony to the same effect.

The government argued to the court of appeals that this testimony was self-serving and noted that the district court may reject assertions by the defendant as mere "puffery" if the record indicates otherwise, citing *United States v. Kinder*, 946 F.2d 362, 366 (5th Cir. 1991), cert. denied, 112 S.Ct. 1677, 2290 (1992). However, where the court of appeals erred was that record in this case does not indicate otherwise. Once again, there is a total lack of evidence to support the district court's rejection of the unrebutted testimony of Yeager and petitioner. Therefore, because the trial court was "clearly erroneous" in its sentencing decision, and because the court of appeals was likewise incorrect, this Honorable Court should reverse and remand this case based upon the evidence, or lack thereof, that defendants had the ability and the intent to sell more than two kilograms.

B. CONFLICT WITH THE EIGHTH CIRCUIT

In handing down this decision, the Fifth Circuit Court of Appeals has squarely placed itself in conflict with the Eighth Circuit's decision in *United States v. Foley*, 906 F.2d 1261 (8th Cir. 1990), the leading case among all circuits on this specific issue. *See also United States v. Reyes*, 979 F.2d 1406 (10th Cir. 1992). In *Foley*, an undercover agent and Foley agreed to arrange for the sale of an ounce of cocaine to the agent. *Foley*, 906 F.2d at 1261.

Following that initial sale, an additional sale was set up and consummated. *Id.* at 1262. A third sale involving Foley occurred a few days later. *Id.* Allegedly at this third sale, Foley negotiated for one more additional sale of two ounces of cocaine to the agent. *Id.* This additional amount of two ounces was considered in determining Foley's base offense level under the United States Sentencing Guidelines despite the fact that this last sale was not consummated. *Id.*

The Eighth Circuit found the trial court was clearly erroneous in its finding that Foley negotiated for the sale of the additional two ounces of cocaine. *Id.* at 1264. Contrary to the presentence report that Foley offered to arrange the sale of another two ounces, the appellate court found the agent initiated the topic of an additional two ounces of cocaine. *Id.* The court stated:

> We recognize that the amounts suggested by the agent was likely within the capacity that Foley could obtain for sale and that the agent need not actually intend to ever buy the amount suggested. Thus, had the two *agreed* to another sale of cocaine, any amount under negotiation for such a sale could be used in calculating the [base offense level]. But these facts show us nothing approaching an agreement or negotiation. The only statement from Foley is that two ounces would go for the same price as two one-ounce buys. The agent might just have easily have asked what the price of a kilogram would be in an effort to have such an amount later to be factored into the [base offense level]. *Id.* at 1265. (Emphasis in original.)

Despite the fact that the facts of the present case and the facts in *Foley* are startlingly similar, and from the standpoint of petitioner Cozad, even better, the court of appeals rejected Cozad's argument. As noted above, at the sentencing hearing the DEA agent testified that the government's confidential informant initiated the discussion of the purchase of the five kilograms and showed money sufficient for that purchase to co-defendant Yeager. Yeager testified that he, in effect, "strung along" the confidential informant to make the sale of the two kilograms by "puffing" about the possible sale of another three kilograms. However, both Mr. Yeager and Mr. Cozad testified, unrebutted, that neither had the capability nor the intent to consummate a sale for another three kilograms of cocaine. As between Mr. Cozad and Mr. Yeager, at the very least, there certainly were no negotiations, much less an offer and acceptance constituting an agreement, to sell more than two kilograms of cocaine to the confidential informant. Indeed, Cozad argues that there was not even an offer and acceptance constituting an agreement between the confidential informant and Mr. Yeager. However, there is no doubt that he was not involved in any of these negotiations and thus had no idea what Mr. Yeager was even talking about. He was completely removed from the negotiating process with the confidential informant. Thus, there were no negotiations that he was involved in, and he certainly had no intent to produce more than two kilograms of cocaine. The evidence introduced at the sentencing hearing showed that Cozad only had the capability and intent to produce two kilograms of cocaine.

Further, even in the conversation directed by the DEA between Mr. Yeager and Mr. Cozad after Mr. Yeager had been arrested and agreed to cooperate, there was no mention of the sale of an additional three kilograms over and above the sale of two kilograms that had been consummated. This certainly underscores the complete lack of offer and acceptance necessary to constitute an agreement and necessary to show ability and intent to produce an additional three kilograms beyond the two kilogram sale. Surely the DEA when it controlled Yeager could have directed Yeager to offer Cozad more money or to specifically discuss the sale of another three kilograms during the phone conversation in which Yeager cooperated. Needless to say, this did not occur and is indicative of the fact that there was no actual agreement to produce the additional kilos and that Cozad was incapable of producing them.

The Eighth Circuit expressed concern in *Foley* that an "intolerable avenue for abuse will be opened" when "the government conducts an undercover operation and (during the sale after which it knows an arrest will be made) makes a suggestion to the defendant about future sales." *Id.* at 1265.

> While a defendant may be sentenced on the basis of uncharged conduct, that conduct must be his own (or where applicable that of a co-conspirator), not the government's conduct. We should not countenance allowing the government to manufacture conduct or negotiation without some evidence of *knowing participation by the defendant* in that conduct or negotiation. *Id.* at 1265. (Emphasis added.)

Certainly this court should not countenance manufactured negotiations in this case where the evidence

shows the utter lack of knowing participation by petitioner Christopher Cozad. Indeed, petitioner asserts that the facts in his case constitute the "intolerable avenue for abuse" feared by the Eighth Circuit in *Foley*. For these reasons, this court should adopt wholeheartedly the reasoning set down in *Foley*, reject the Fifth Circuit's stance and reverse and remand this case for re-sentencing.

CONCLUSION

Because this case constitutes a departure from the accepted and usual course of judicial proceedings and because the Fifth Circuit in this matter failed to recognize the cogent reasoning set forth in *United States v. Foley, supra*, this Court should grant a writ of certiorari in this matter.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-3423
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CHRISTOPHER COZAD,

Defendant-Appellant.

* * *

No. 93-3424
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EDWIN YEAGER,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. CR-92-547-N3

(Filed Jan. 06 1994)

Before GARWOOD, JOLLY, and BARKSDALE, Circuit Judges.

PER CURIAM:*

Christopher Cozad and Edwin Yeager appeal their sentences for conspiring to distribute cocaine contending that the district court erred in attributing five kilograms as relevant conduct. Yeager contends that the district court erred in refusing to grant him a two-point reduction for being a minor participant.

In determining the base offense level under the sentencing guidelines, "relevant conduct" that the court may consider includes "all acts and omissions . . . that were part of the same course of conduct or common scheme or plan as the offense of conviction." U.S.S.G. § 1B1.3(a)(2). The sentencing guidelines provide that "quantities of drugs not specified in the count of conviction may be considered in determining the offense level." § 2D1.1, comment. (n.12).

Such findings need be determined by only a preponderance of the evidence. *See United States v. Alfaro*, 919 F.2d 962, 965 (5th Cir. 1990). Once evidence of the amounts of controlled substances is provided on the record, the defendant has the burden to prove that such evidence is "materially untrue, inaccurate or unreliable."

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

United States v. Kinder, 946 F.2d 362, 366 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 1677, 2290 (1992). If the defendant contests facts or conclusions set forth in the PSR, the district court may adopt the PSR only so long as the record reflects that the court fairly considered the relevant factors in dispute when it made its decision. *United States v. Sherbak*, 950 F.2d 1095, 1099 (5th Cir. 1992); *see* Fed. R. Crim. P. 32(c)(3)(D). In a conspiracy, the defendant is accountable for conduct of others that was in furtherance of the jointly undertaken criminal activity and was reasonably foreseeable in connection with that criminal activity. § 1B1.3(a)(1)(B) & comment. (n.1).

The district court considered the testimony of Cozad and Yeager and the arguments of their attorneys when it rejected the argument that Yeager was merely bluffing when he agreed to broker a total of five kilograms of cocaine. The district court is always free to reject a defendant's declarations which are apparently made for the purpose of reducing his sentence. *United States v. Buenrostro*, 868 F.2d 135, 138 (5th Cir. 1989), *cert. denied*, 495 U.S. 923 (1990). The district court may reject assertions that information provided by the defendant was merely "puffery" if the record indicates otherwise. *Kinder*, 946 F.2d at 366.

A finding is clearly erroneous only if, in spite of the evidence showing a certain quantity of drugs, this Court is still "left with the definite and firm conviction that a mistake has been committed." *United States v. Mitchell*, 964 F.2d 454, 457-58 (5th Cir. 1992) (citation omitted). Based on this record, the district court did not commit such a mistake. The findings of intent, and, to a lesser

extent, that of ability, are supported by the ample testimony regarding the negotiations for five kilograms. The finding of ability is also supported by Yeager's testimony that Cozad had been involved in at least one prior cocaine transaction. The production of the initial two kilograms supports the finding that the defendants were able to produce an additional three kilograms. The findings of the district court are plausible in light of the record as a whole and thus are not clearly erroneous. *United States v. Sanders,* 942 F.2d 894, 897 (5th Cir. 1991).

Yeager contends that he was less culpable than Cozad because it was Cozad who knew the inner workings of the drug organization; who had supplied the two kilograms of cocaine; and who stood to benefit more financially from the transaction.

A "minor participant" is defined as one "who is less culpable than most other participants, but whose role could not be described as minimal." § 3B1.2, comment. (n. 3); *see United States v. Lokey,* 945 F.2d 825, 840 (5th Cir. 1991). Simply being less involved than other participants will not warrant minor participant status; a defendant must be peripheral to the furtherance of illegal endeavors. *United States v. Thomas,* 932 F.2d 1085, 1092 (5th Cir. 1991), *cert. denied,* 112 S.Ct. 887 (1992).

Because most offenses are committed by participants of roughly equal culpability, it is intended that the adjustment be used infrequently. *United States v. Windham,* 991 F.2d 181 (5th Cir. 1993), *cert. denied,* 114 S.Ct. 444 (1993). Whether a defendant played only a minor role in a conspiracy is a factual determination which must be upheld unless it is clearly erroneous. *United States v. Giraldo-Lara,*

919 F.2d 19, 22 (5th Cir. 1990). A party seeking a reduction of the sentencing guidelines must establish by a preponderance of the evidence the factual basis warranting the reduction. *See Alfaro,* 919 F.2d at 965.

Yeager's culpability may have been the lesser of the two defendants, but Yeager, through numerous recorded conversations with the CI, negotiated the transaction on behalf of himself and Cozad. As planned, the two kilogram cocaine transaction occurred at his residence. Yeager's role was not peripheral. The court did not clearly err in denying Yeager a downward adjustment for minor participant status.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA CRIMINAL ACTION

VS. CHRISTOPHER COZAD
4026 PALMYRA ST.
NEW ORLEANS, LA 70119

266-31-5640
(SOC. SEC. NO.)

92-547 N
(CASE NO./SEC.)

JUDGMENT AND PROBATION/
COMMITMENT ORDER

(Filed June 4, 1993)

In the presence of the attorney for the government, the defendant appeared in person on this date – ___ Month ___ Day ___ Year (June 1, 1993)

_WITHOUT COUNSEL
xWITH COUNSEL

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

Ralph Capitelli, 2950 Energy Centre, New Orleans, LA 70130
(Name of Counsel)

Court Reporter's Name: Dee Malouse

PLEA: xGUILTY, and the court being satisfied that there is a factual basis for the plea.
_NOLO CONTENDERE
_NOT GUILTY

There being a finding of (_NOT GUILTY. Defendant is discharged. (xGUILTY.

Defendant has been convicted as charged of the offense(s) of 21 USC 846, conspiracy to distribute cocaine hydrochloride, a Schedule II narcotic drug controlled substance; 18 USC 2, aiding and abetting

The sentence is imposed pursuant to the Sentencing Reform Act of 1984. The court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 105 months, as to Counts 1 and 2, to be served concurrently. Upon release from imprisonment, the defendant shall be placed on supervised release for a term of four years, on each of Counts 1 and 2, all such terms to run concurrently. Within 72 hours of release from the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in the district in which the defendant is released. While on supervised release, the defendant shall not commit another federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court. In addition to the standard conditions of probation, the defendant shall comply with the following special conditions: 1) That the defendant shall participate in a program of testing and/or treatment for drug abuse, as directed by the probation officer, until such time as the defendant is released from the program by the probation officer. 2) That the defendant permit the United States Probation Officer to conduct searches and seizures of concealed

contraband on the defendant's person, and in any building, vehicle(s), or other areas under the defendant's control, at such times as the United States Probation Officer shall decide. IT IS FURTHER ORDERED that the defendant shall pay to the United States a special assessment of $50.00 as to Count(s) 1 & 2, for a total assessment of $100.00

IT IS FURTHER ORDERED that the defendant notify the United States Attorney for this District within 30 days of any change of residence or mailing address until all fines, restitution, costs and special assessments imposed by this Judgment are fully paid. In addition to the special conditions of probation imposed above, IT IS HEREBY ORDERED that the general conditions of probation/ supervised release set out on the reverse side be imposed.

IT IS FURTHER ORDERED:

[ ] The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

[ ] The court has determined that the defendant does not have the ability to pay interest. The interest requirement is (waived) (modified as follows):

SIGNED BY:

x U.S. District Judge
_ U.S. Magistrate /s/ Edith Brown Clement

(Date) June 3, 1993

DATE OF ENTRY JUN 07 1993

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment:

1) The defendant shall not commit another Federal, state or local crime;

2) the defendant shall not leave the judicial district without the permission of the court or probation officer;

3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

4) the defendant shall answer truthfully, all inquiries by the probation officer and follow the instructions of the probation officer;

5) the defendant shall support his or her dependents and meet other family responsibilities;

6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;

8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgment.

The court makes the following recommendation to the Bureau of Prisons:

That the defendant be incarcerated in FPC Pensacola, Saufley Field, Pensacola, FL.

IT IS ORDERED that the Clerk deliver a certified copy of this Judgment and Commitment to the U.S. Marshal or other qualified officer.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

_____
United States Marshal

_____
Deputy Marshal

APPENDIX C

93-3423
In the
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-3423

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

CHRISTOPHER COZAD,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

ORIGINAL BRIEF ON BEHALF OF CHRISTOPHER COZAD

(Received Sept. 1, 1993)

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certify that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

Christopher Cozad – Defendant

Judge Edith Brown Clement – District Court Judge

Ralph Capitelli – Defense Counsel

Richard A. Cozad – Defense Counsel

Edwin B. Yeager – Co-Defendant

Gary V. Schwabe, Jr. – Public Defender for Co-Defendant

Mary Jude Darrow – Government Attorney

REQUEST FOR ORAL ARGUMENT

Appellant respectfully requests oral argument so that counsel may directly address the sentencing issue presented in this appeal, which is of novel importance. Appellant believes that oral argument will provide this Court with an opportunity for thorough discussion of the issue.

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STATEMENT OF JURISDICTION

This Honorable Court has jurisdiction over this matter because it is a final judgment pursuant to 28 U.S.C. Section 1291.

STATEMENT OF ISSUE

The trial court sentenced appellant on the basis of its finding that he had the intent and capability to produce five kilograms of cocaine as opposed to the two kilograms of cocaine which were actually sold to an undercover agent. There was no testimony or evidence introduced at the sentencing hearing to support his finding by the trial court. Was this clear error?

STATEMENT OF THE CASE

A) COURSE OF PROCEEDINGS AND DISPOSITION IN COURT BELOW

Christopher Cozad along with co-defendant Edwin B. Yeager was indicted in the above-captioned matter on November 6, 1992. The first count of the indictment

charged that the defendants knowingly conspired to distribute cocaine, and the second count alleged that the defendants knowingly and intentionally possessed with intent to distribute two kilograms of cocaine. Mr. Cozad and his co-defendant pled guilty to both counts on March 3, 1993.

On June 1, 1993, Cozad was sentencing [sic] to a term of imprisonment of 105 months as to counts 1 and 2 of the indictment, to be served concurrently.

B) STATEMENT OF FACTS

The sole issue in regard to this matter is whether the sentence imposed upon appellant was improper.

The government alleged in its factual basis at the time of re-arraignment that an agreement was reached between co-appellant Yeager and a confidential informant to sell five kilograms of cocaine for $147,500.00. According to the factual basis, after being shown this money, co-appellant allegedly stated his source would supply five kilograms on November 1, 1992, and then later allegedly informed the confidential informant that his source of the cocaine wanted to sell two kilograms on October 31, 1992, and three the following week. (Supp. Record, p. 15.) During the re-arraignment the district court inquired of the defendants if they had any questions to ask the assistant United States Attorney in regard to the factual basis. Both appellants acknowledged and pled to the sale of the two kilograms but disputed the sale of a total of five kilograms. (Supp. Record, pp. 16-17.) The district court

agreed with the defendants that the amount of cocaine would be a matter for sentencing. (Supp. Record, p. 17.)

At the sentencing hearing held on June 1, 1993, the government called as its only witness DEA Agent Mark Kiger, who testified on direct examination that the *confidential informant initiated* the five kilogram figure in a conversation with co-appellant Yeager, (Vol. 2, p. 6.), and presented Yeager with enough money for two kilos. (Vol. 2, p. 6-7.) Agent Kiger stated that Mr. Yeager responded to this request by the confidential informant that the [sic] could provide five kilograms of cocaine. (*Id.*) Agent Kiger also testified on direct examination that there were recorded conversations between co-appellant Yeager and the confidential informant in regard to the negotiations. (Vol. 2, p. 7.) Specifically, he stated that on October 26th Mr. Yeager told the informant that he had five kilograms. (*Id.*)

However, it is important to note that at no time did the agent testify that Mr. Cozad stated anything about five kilograms on any tapes or was involved in any negotiations in regard to five kilograms. Indeed, when specifically asked if Mr. Cozad, while at Mr. Yeager's residence with the confidential informant on October 31, 1992, participated in any discussions as to quantity, Agent Kiger replied: "I don't believe there was. I believe all that was discussed was whether the informant was going to be able to see the cocaine or not." (Vol. 2, p. 8.) Agent Kiger also testified that when the original date for the production of cocaine was delayed until Monday, November 2, 1992, only two kilos, not five were to be delivered. (Vol. 2, p. 10.)

It is also noteworthy that the government chose not to introduce any of the taped conversations between the confidential informant and either defendant or to call the confidential informant to testify.

On cross-examination, Agent Kiger admitted that it was the confidential informant, not either of the defendants, who raised the idea of the sale of four or five kilos *per instructions to him from the DEA* in his initial conversation with Mr. Yeager. (Vol. 2, p. 11-12.) Further, the agent admitted that, in that first conversation Mr. Yeager stated that only a smaller amount, one or two kilos, was possible. (Vol. 2, p. 12.) Agent Kiger also admitted that despite the presentation of $147,500.00 from the confidential informant to Mr. Yeager, money sufficient for a five-kilo deal, the only amount sold on November 2, 1992, was slightly less than two kilograms. (Vol. 2, p. 13.)

Agent Kiger also testified on cross-examination that Mr. Cozad was only on three conversations taped by the federal government, one on October 31st, one when the informant met at Mr. Yeager's house, which Agent Kiger testified as being "virtually useless," one on November 2nd generated by the DEA with the cooperation of co-appellant Yeager. (Vol. 2, p. 13-17.) It was undisputed that in *none* of those conversations were there references to five kilograms. (*Id.*) In the October 31st conversation there was no discussion of amounts. (Vol. 2, p. 16-17.) In the November 2nd conversation prompted by the DEA after Mr. Yeager had been placed under arrest and was cooperating with the DEA, there was no reference to an additional three kilograms, despite the fact that Mr. Yeager was making the phone call under the direction of and instructions of the DEA. (Vol. 2, p. 17.) Agent Kiger

stated: "No, this conversation just centered around how the money was supposed to get into Mr. Cozad's hands. That was the topic of the conversation." (*Id.*)

Co-appellant Edwin Yeager testified that the confidential informant asked him if he thought he could get five kilograms and he told the confidential informant he did not know if he could do this. "I really don't know. And then we talked again, I said, look I could get you one and then I could get you two, if we ended up with – . . . . "

Mr. Yeager testified at the sentencing hearing that the greatest quantity that he know co-appellant Cozad sold in the past was only one kilo, and that the confidential informant "just seemed like he always kept pumping up to get to five. I mean took what he could get, but it just seemed like he kept pumping up to the five all the time." (Vol. 2, p. 22.) He stated that to keep the confidential informant "around" he told him he would see what he could do. (Vol. 2, p. 23.) This was only for the purpose of keeping him around to make the transaction for the one or two kilograms. (*Id.*) Mr. Yeager testified that in the beginning he may have mentioned five kilograms to Mr. Cozad but Mr. Cozad said, according to co-appellant Yeager, "No, no way, wouldn't do it and couldn't do it." (*Id.*) Mr. Yeager testified in response to a question of whether there ever was any serious intent to sell five kilograms: "Not at all, not at all." (*Id.*) On direct examination by undersigned counsel, Yeager also testified that the DEA told him what to say during his telephone conversation on November 2 with Mr. Cozad but that he *did not say anything* about additional kilos of cocaine or when an additional deal could be culminated for kilograms over

and above the two kilograms that were sold. (Vol. 2, p. 24.)

On cross-examination by the government Mr. Yeager consistently stated that he was not able to produce five kilograms despite the fact that the confidential informant kept asking for five kilograms continuously. "I wasn't going to give him five. I didn't have five. I had two. I gave him the two and that was going to be the end of the dealings with him." (Vol. 2, p. 28.)

Appellant Cozad took the stand at the sentencing hearing and testified that at no time did he have an agreement with anyone to deliver any cocaine over and above the two kilograms that were sold. (Vol. 2, p. 30.) He testified that he was not capable of producing *and* had no intent to produce any more cocaine than two kilograms. (Vol. 2, p. 31-32.)

SUMMARY OF THE ARGUMENT

Appellant Cozad believes that his sentence should be vacated and that his case be remanded for re-sentencing because the trial court clearly erred in finding that he was reasonably capable of producing and did intend to produce five kilograms of cocaine.

ARGUMENT

Section 2D1.1 of the United Stats Sentencing Guidelines controls the determination for the base offense level of the offenses to which appellant has pled guilty. Application Note 12 of the U.S.S.G. Section 2D1.1 states "[t]ypes and quantities of drugs no specified in the count

of conviction may be considered in determining the offense level. See Section 1B1.3(a)(II) (Relevant Conduct)." Application Note 12 further states:

> In an offense involving negotiation to traffic in a controlled substance, the weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount. However, where the court finds that the defendant did not intend to produce and was not reasonably capable of producing the negotiated amount, the court shall exclude from the guideline calculation the amount that it finds *the defendant did not intend to produce and was not reasonably capable of producing.*[1]

Appellant maintains that there can be no doubt that the trial court was "clearly erroneous"[2] in finding that he had the capability and intent to produce five kilograms for sale in this matter. The evidence elicited at the sentencing hearing and the case law firmly support appellant's contention.

The leading Fifth Circuit case on this specific issue is *United States v. Garcia,* 889 F.2d 1454 (5th Cir. 1989), in which the defendant was indicted for various acts involving the distribution of cocaine. Garcia objected to the probation officer's recommendation in the presentence

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[1] This language was formerly included in Application Notes to U.S.S.G. Section 2D1.4, which section was deleted effective November 1, 1992. At the same time the quoted language was inserted in Application Note 12 to U.S.S.G. Section 2D1.1. Amendment 447, Amendments to Sentencing Guidelines.

[2] This Honorable Court reviews the trial court's ruling on this matter under the "clearly erroneous" standard of review. *United States v. Alfaro,* 919 F.2d 962 (5th Cir. 1990).

report that his sentence be determined based upon 16 ounces of cocaine rather than 8 ounces, asserting that the district court was limited to consideration of only the eight ounces of cocaine specified in count 2 of the indictment to which he had pled (distribution of eight ounces of cocaine). *Id.* at 1456. Apparently during the course of negotiations of the distribution of the eight ounces, Garcia had represented that he could deliver 16 ounces. *Id.* The district court found that this was not mere "puffing" because he was reasonably capable of producing an additional eight ounces. *Id.* The Fifth Circuit found that the trial court's finding of fact was not clearly erroneous. *Id.*

The lack of factual development as set forth in the Garcia case contrasted with the full factual development in this case show that, if anything, co-appellant Yeager was only puffing to keep the confidential informant "around" to complete the two-kilo sale.

Further, there is no doubt that the district court clearly erred in finding appellant Cozad reasonably capable of producing and having the intent to produce three more kilograms of cocaine. There was no evidence of any conversations between the confidential informant and Mr. Cozad or Yeager and Mr. Cozad in which an additional three kilograms beyond the sale of two kilograms was negotiated. In fact, when Yeager mentioned the idea to Cozad in the beginning, Cozad told Yeager stated he "wouldn't" do it and "couldn't" do it. (Vol. 2, p. 23.) Indeed, even in the phone conversation between Mr. Yeager and Mr. Cozad directed by the government, there was no mention of an additional three kilograms over and above the two kilograms sold. Simply put, there not only was a lack of evidence showing capability and intent

on the part of appellant Cozad to produce and sell more cocaine but also a virtual vacuum of such evidence.

It is also important to note that because of Mr. Yeager's cooperation with the DEA in the phone call to Cozad – which notable *did not* include any discussion of the sale of another three kilos of cocaine – the government filed a "5K Motion" (U.S.S.G. Section 5K1.1) on behalf of Mr. Yeager because of his cooperation. (Vol. 2, p. 45.) The fact the government believed Mr. Yeager cooperated to the extent he deserved a "5K Motion" despite his lack of any mention in this conversation about selling three more kilograms lends even more credence and support to Mr. Cozad's argument.

Possibly the leading case among all circuits on this specific issue is *United States v. Foley*, 906 F.2d 1261 (8th Cir. 1990). *See also United States v. Reyes*, 979 F.2d 1406, 1410-1411 (10th Cir. 1992); *United States v. Moon*, 926 F.2d 204 (2nd Cir. 1991). In *Foley* an undercover agent and Foley agreed to arrange for the sale of an ounce of cocaine to the agent. 906 F.2d at 1261. Following that initial sale, an additional sale was set up and consummated. *Id.* at 1262. Allegedly at this sale, Foley negotiated for the later sale of two ounces of cocaine to the agent. *Id.* This additional amount of two ounces was considered in determining Foley's base offense level under the United States Sentencing Guidelines despite the fact that the sale was not consummated. *Id.*

The Eighth Circuit found the trial court was clearly erroneous in its finding that Foley negotiated for the sale of the additional two ounces of cocaine. *Id.* at 1264. Contrary to the presentence report that Foley offered to

arrange the sale of another two ounces, the appellate court found the agent initiated the topic of an additional two ounces of cocaine. *Id.* The court stated:

> We recognized that the amount suggested by the agent was likely within the capacity that Foley could obtain for sale and that the agent need not actually intend to ever buy the amount suggested. Thus, had the two *agreed* to another sale of cocaine, any amount under negotiation for such a sale could be used in calculating the [base offense level]. But these facts show us nothing approaching an agreement or negotiation. The only statement from Foley is that two ounces would go for the same price as two one-ounce bust. The agent might just have easily asked what the price of a kilogram would be in an effort to have such amount later to be factored into the [base offense level]. *Id.* at 1265. (Emphasis in original.)

The facts of this case are startlingly similar to those in *Foley* and, from the standpoint of appellant Cozad, even better. At the sentencing hearing the DEA agent testified that the government's confidential informant initiated the discussion of purchase of five kilograms and showed money sufficient for the purchase of five kilograms of cocaine to co-appellant Edwin Yeager. (Vol. 2, p. 6-7.) Mr. Yeager testified that he, in effect, "strung along" the confidential informant to make the sale of the two kilograms by "puffing" about the possible sale of another three kilograms. (Vol. 2, p. 23.) However, both Mr. Yeager and Mr. Cozad testified that neither had the capability nor the intent to consummate a sale for another three kilograms of cocaine. (Vol. 2, pp. 28, 30, 31-32.) Indeed, Mr. Yeager testified that the greatest quantity that he

knew Mr. Cozad to be able to "move" in the past was one kilo. (Vol. 2, p. 22.) As between Mr. Cozad and Mr. Yeager, there certainly were no negotiations, much less offer and acceptance constituting an agreement, to sell more than two kilograms of cocaine to the confidential informant. Mr. Cozad was not even involved in the negotiations directly and thus had no idea what Mr. Yeager was even talking about. He was one step removed from the negotiating process with the confidential informant. Thus, there were no negotiations that he was involved in, and thus he certainly had no intent to provide more than two kilograms of cocaine. The evidence adduced at the sentencing hearing also showed that Cozad only had the capability to produce two kilograms of cocaine.

Appellant also emphasizes that the government chose not to introduce any of the taped conversations at the sentencing hearing. The transcript certainly shows that one of them was unintelligible. (Vol. 2, p. 16.) In any case, despite there being other tapes that were clearly understandable, the government did not introduce these. This decision speaks volumes. For the district court to rule as it did based on the testimony of a lone agent who was not present during *any* conversation and without a single tape as evidence or the testimony of the confidential informant is an affront to the Sentencing Guidelines.

Further, as noted above, even in the conversation *directed* by the government between Mr. Yeager and Mr. Cozad after Mr. Yeager had been arrested, there was no mention of the sale of an additional three kilograms over and above the sale of two kilograms that had been consummated. Indeed,the availability of funds coupled with

no follow-up conversation in the DEA-controlled conversation between Yeager and Cozad after Yeager's arrest clearly demonstrate that Cozad there was no actual agreement to produce the additional kilos and that Cozad was incapable of producing kilos.

The Eight Circuit also expressed concern in *Foley* that an "intolerable avenue for abuse will be opened" when "the government conducts an undercover operation and (during the sale after which it knows an arrest will be made) makes a suggestion to the defendant about future sales." *Id.* at 1265. "While a defendant may be sentenced on the basis of uncharged conduct, that conduct must be his own (or where applicable that of a co-conspirator), not the government's conduct. We should not countenance allowing the government to manufacture conduct or negotiation without some evidence of *knowing* participation by the defendant in that conduct or negotiation." *Id.* at 1265. (Emphasis added.)

Likewise, this court should not countenance the manufactured negotiation in this case where the evidence shows the utter lack of knowing participation by appellant Cozad.

CONCLUSION

For the foregoing reasons, appellant Cozad requests that this Honorable Court vacate his sentence and remand this case for resentencing on the basis of the sale of only two kilograms of cocaine due to the complete lack

of evidence in regard to the negotiation of any cocaine other than the two kilograms.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served upon the Assistant United States Attorney handling his matter, this 1st day of September, 1993.

/s/ Ralph Capitelli
RALPH CAPITELLI

APPENDIX D

93-3423

In the
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-3423

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

CHRISTOPHER COZAD,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF LOUISIANA

REPLY BRIEF ON BEHALF OF CHRISTOPHER COZAD

(Received Oct. 26, 1993)

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INTRODUCTION

Appellant Christopher Cozad files this reply brief to address factual inaccuracies, mischaracterizations and inferences set forth in the government's brief, all of which show the weakness of the government's argument in this case.

ARGUMENT

First, the government states that the "defendants and the CI discussed the cocaine transaction." (Government's

Brief at p. 4.) This is a totally inaccurate and unfair portrayal of the evidence presented at the sentencing hearing in this matter.

The government chose to put only the investigating agent on the stand at the hearing, not the confidential informant. The agent testified that on October 31, 1992, Cozad met at co-defendant Yeager's residence with the CI. Quantity was not discussed. The agent testified: "I believe all that was discussed was whether the informant was going to be able to see the cocaine or not." (Record, Vol. 2, p. 8.) In another conversation involving Cozad, Yeager and the CI, the agent agreed that there was no reference to a sale of five kilograms. (*Id.*, p. 16.) Cozad's testimony confirmed not only the agent's testimony but also that in a phone call between Yeager and Cozad (which Yeager made under DEA direction), there was no mention of any sale beyond two kilos. (*Id.*, p. 31.)

Second, the government makes much of a conversation between Yeager and the CI to make one sale of two kilograms of cocaine on October 31, 1992, and another of three kilograms the following week. (Government's Brief at p. 4.) However, several facts should be noted. First, this is again a conversation between Yeager and the CI, *not* involving Cozad. Second, as Yeager testified at the sentencing hearing, *in the beginning* he may have mentioned five kilograms to Cozad; but, according to Yeager, Cozad said: "No, no way, wouldn't do it and couldn't do it." (*Id.*, p. 23.) Indeed, Yeager testified that the mention of five kilos to the CI was nothing more than "puffing" to get the two-kilo sale completed. (*Id.*) Additionally, as Yeager testified, during a phone conversation between himself and Cozad directed by the DEA, Yeager *was not told* by the

DEA to say anything about additional sales of cocaine or when an additional deal could be culminated for an amount over and above the two kilograms sold. (*Id.*, p. 24.)

This testimony by Yeager stands unrebutted, for the government chose *not* to put the CI on the stand or introduce any of its tape recordings at the sentencing hearing, only the investigating agent.

Further, in light of this unrebutted testimony from Yeager, the government wrongly mischaracterizes Cozad's testimony denying his ability or intent to produce more than two kilos (*Id.*, pp. 31-32.) as self-serving.

It is important to note that not only is Yeager's testimony unrebutted but so is Cozad's. Cozad also testified that at no time did he have an agreement with anyone to sell more than two kilos, as confirmed by Yeager's testimony.

Third, this court should also note a very interesting omission from all of the conversations in the record between Yeager and Cozad, including the phone call Yeager made at the direction of the DEA. There is no evidence in the record that Yeager ever mention to Cozad the $147,500.00 supposedly shown by the CI to Yeager. The government relies heavily on the CI's showing this money to Yeager to support its argument that there was going to be a purchase of five kilos. (Government's Brief at pp. 8-9.) Yet, this large amount of money is never mentioned by Yeager to Cozad, even during the Yeager-Cozad phone call directed by the DEA. Surely, had there been intent and capability to make a five-kilo sale, Yeager

would have told Cozad about the $147,500.00 or Cozad would have inquired about it. Neither occurred.

The fourth mischaracterization is the government's statement that the defense complains because tapes were not introduced at the sentencing hearing. (Government's Brief at p. 10.) This is not what Cozad argued. In his brief Cozad contended that the government failed to carry its burden of proof on enhancement of his sentence because the government did not present sufficient evidence.[1] This argument included the fact that the government failed to introduce any taped conversations at the hearing in addition to not calling the CI as a witness. The government obviously missed the point, and this is indicative of the government's cavalier attitude toward the facts, law and the argument in this case.

Finally, Cozad again states that oral argument would be worthwhile in this case so counsel can address any factual questions in person and to prevent any further misunderstanding in this most important matter.

CONCLUSION

The government's apparent disregard of the facts shows that it sees the weakness in its own case. Cozad respectfully submits that the record clearly shows he was not capable of producing and had no intent to produce any more cocaine after the two-kilo sale. Therefore, this Court should vacate his sentence and remand this case

---

[1] "[T]he party seeking an adjustment in the sentencing level must establish the factual predicate justifying the adjustment." *United States v. Alfaro*, 919 F.2d 962, 965 (5th Cir. 1990).

for resentencing on the basis of one sale of two kilograms of cocaine.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served upon the Assistant United States Attorney handling this matter, this 26th day of October, 1993.

/s/ Ralph Capitelli
RALPH CAPITELLI

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

UNITED STATES
OF AMERICA

Plaintiff

v.

CHRISTOPHER COZAD
EDWIN B. YEAGER

Defendants

Docket No. CR 92-547 N

New Orleans, Louisiana
June 1, 1993
9:00 a.m.

(Jun. 14, 1993)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JUDGE
EDITH BROWN CLEMENT
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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For the Defendants: Capitelli & Wicker
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2950 Energy Centre
Christopher Cozad New Orleans, Louisiana 70130

McAlpine, Peuler, Cozad & Davie
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701 S. Peters Street – Suite 300
New Orleans, Louisiana 70130

Edwin B. Yeager — Federal Public Defender
BY: GARY SCHWABE, ESQ.
501 Magazine Street
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Court Recorder: Diane Malouse
Transcribed by: Donna M. Shepherd-Gettys, CSR.
P.O. Box 1684
Metairie, Louisiana 70004
(504) 837-0946

Proceedings recorded by electronic sound recording, transcript produced by transcription service.

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[p. 3] THE CLERK: United States of America versus Christopher Cozad and Edwin Yeager, Criminal Action Number 92-547.

MS. DARROW: Good morning, Your Honor. Mary Jude Darrow on behalf of the United States.

THE COURT: Good morning.

MR. SCHWABE: Good morning, Your Honor. Gary Schwabe on behalf of Edwin Yeager who is present before the court and prepared for sentencing this morning.

MR. CAPITELLI: Good morning, Your Honor. Ralph Capitelli along with Richard Cozad, we are here on behalf of Chris Cozad who is also present before the court and ready for the Court's sentencing.

THE COURT: All right. There had been an objection to the calculation of the sentence based on the amount of cocaine. I had understood that the agent was prepared to testify, is that correct?

MS. DARROW: Yes, Your Honor.

THE COURT: All right, why don't we proceed with that.

MS. DARROW: Your Honor, the will [sic] government will call Agent Mark Kiger to the stand.

MARK K. KIGER, PLAINTIFF'S WITNESS, SWORN

THE CLERK: For the record, please state your name and spell it.

THE WITNESS: Mark K. Kiger, K-I-G-E-R.

[p. 4] DIRECT EXAMINATION

BY MS. DARROW:

Q. How are you employed sir?

A. I am special agent for the United States Drug Enforcement Administration.

Q. In the fall of 1992, did you begin or initiate an investigation into cocaine trafficking activities by one Edwin Yeager?

A. Yes, I did.

Q. Do you see him in court?

A. Yes, I do.

Q. Would you please identify him?

A. Mr. Yeager is sitting behind Mr. Schwabe in the light gray suit.

MS. DARROW: I would ask the record to reflect that the defendant has been identified.

BY MS. DARROW:

Q. And did that investigation lead you also to one Christopher Cozad?

A. Yes, it did.

Q. Do you see Mr. Cozad in court?

A. Yes, I do.

Q. Would you please identify him?

A. He is sitting behind his attorney Mr. Capitelli and I believe it's a dark green suit.

[p. 5] MS. DARROW: I would ask the record reflect that the defendant has been identified.

BY MS. DARROW:

Q. Now, sir, at what point in time did you learn of Mr. Cozad's identity?

A. It was shortly after we initiated the investigation; without looking at my notes I can't give you a particular day.

Q. Was it prior to the arrest of Mr. Cozad and Mr. Yeager?

A. Yes, it was.

Q. Okay. And, sir, to further the investigation you used a confidential informant, correct?

A. Yes, we did.

Q. And, who did he do his negotiating with?

A. Initially it was with Mr. Yeager, but then later in the investigation the informant negotiated with both Mr. Yeager and Mr. Cozad.

Q. And, the negotiations were for, what, sir?

A. Five kilograms of cocaine.

Q. And the five kilograms of cocaine was to be purchased by who?

A. By the informant.

Q. The informant, was – were any of those conversations taped in any manner?

A. Yes, they were.

Q. And how did the five kilogram quantity, how was that [p. 6] arrived at?

A. That figure was arrived – or was initiated by the informant.

Q. And, initiated by the informant in conversations with who?

A. Mr. Yeager.

Q. And Mr. Yeager's responses to the queries or requests for five kilograms of cocaine were, what, if you could summarize it?

A. He said that he could provide five kilograms of cocaine.

Q. What was the price going to be for the cocaine, sir?

A. It was $29,500 dollars per kilogram and for five that would be $147,500 dollars.

Q. And at any point in time, did Mr. Yeager want to verify whether or not the confidential informant could come up with sufficient funds to pay for this quantity of cocaine?

A. Yes, he did.

Q. And what was done on October, I believe, 26th, 1992?

A. Yes. DEA provided the informant with $147,500 dollars in government money which was placed in a safe deposit box and –

Q. When you say it was provided to him, how was it provided to him?

A. Well, we placed the money in a safe deposit box and then provided the informant with a key to that box and we conducted surveillance and saw Mr. Yeager and mister – or the informant meet and – we didn't actually see them view the money, but we [p. 7] could hear them discussing the money over a recording device.

Q. Okay. And what quantity was in that safe deposit box?

A. $147,500 dollars.

Q. And, were there any recorded conversations between Mr. Yeager and mister – the confidential informant where they discussed the actual quantity?

A. Yes, there was.

Q. Do you recall what dates those might have occurred on?

A. If I can refer to my notes – Yes, on October 20th, 1992 there was discussion about purchasing four to five kilograms.

Q. Okay.

A. And then on October 26th there was discussion about purchasing five kilograms and that was – In that conversation is when it was a – when the informant said that he wanted five and Mr. Yeager said, I have got it.

Q. Now, how did Mr. Cozad fit into this transaction that Mr. Yeager and the confidential informant were negotiating?

A. On the day that the deal was supposed [sic] take place there was some discussion about the informant wanting to see the cocaine before he provided the money and –

Q. Now, you say the day that the deal was supposed to take place, was that October 31st that you are talking about?

A. Yes, that's correct.

Q. 1992?

A. 1992.

[p. 8] Q. Okay, and what happened then?

A. The informant showed up at Mr. Yeager's house expecting to see cocaine. Mr. Cozad also arrived shortly after the informant did and he was involved in the negotiations. And at that point we weren't – that is the informant was not allowed to see any cocaine.

Q. Now, he was allowed to see what you would call, I guess a dummy package?

A. Yes, ma'am.

Q. And that was brought to Mr. Yeager's residence by who?

A. By Mr. Cozad.

Q. And that was observed by agents of the DEA?

A. We – the informant was wearing a recording device and we heard it. We saw Mr. Cozad arrive and depart?

Q. And, when Mr. Cozad was at Mr. Yeager's residence with the confidential informant on October 31st, were there discussions as to the quantity on that date?

A. I don't believe there was. I believe all that was discussed was whether the informant was going to be able to see the cocaine or not.

Q. Okay. What were the ultimate – What was the ultimate agreement as to the delivery of the cocaine?

MR. CAPITELLI: Your Honor, I am going to object to that question. The agent's knowledge as to what was said – what was stated in the conversations was strictly hearsay. If [p. 9] you listen to the tapes which have been provided to us by the government, he was not privy to any of the conversations directly himself. For him to come to a summary of what the intent of the parties was I think is beyond the scope of what this witness can actually testify to, to say what the intent of the parties were when he wasn't present to it, to any of the conversations, didn't see any of it. And, I object to his testifying as to the overall intent.

MS. DARROW: Your Honor, the agents were listening to the conversation as it occurred simultaneously.

THE COURT: Objection overruled.

MS. DARROW: Okay

BY MS. DARROW:

Q. And you were listening to the conversation, correct, sir?

A. Yes, ma'am.

Q. And, what, what agreement was reached?

A. At that point, an agreement was reached that all of the parties would depart. The informant said that he would go check with his people and see if he could front the money and they were to recontact each other in a few minutes. And after a few minutes the informant called Mr. Yeager and also spoke with Mr. Cozad on the phone and they agreed to make contact again. The informant was called again or they were recontacted later in the day and the deal was just put off until Monday November the 2nd 1992.

[p. 10] Q. And on November 2nd, was there to be five kilograms of cocaine delivered?

A. No, there wasn't, during the conversation or during the negotiations we were – or the informant was contacted by Mr. Yeager and said that his people didn't want to do all five at once they wanted to do two kilograms and then do three later in the week.

Q. Okay.

A. So as the deal neared its completion we went from them providing five at once to two and then three later on?

Q. Okay, but they did specify that it would be within the week, they didn't say some day soon down the road, correct?

A. Correct, it was next week.

Q. Okay. And, who, on November the 2nd when the cocaine was delivered or shown to the confidential informant, where was it shown to him?

A. In Mr. Yeager's residence.

Q. And, did you have knowledge as to how it arrived at Mr. Yeager's residence?

A. Yes, I do.

Q. And, how did it arrive there?

A. By Mr. Cozad.

MS. DARROW: I tender the witness Your Honor

THE COURT: Mr. Capitelli.

[p. 11] CROSS EXAMINATION

BY MR. CAPITELLI:

Q. Good morning, Agent Kiger. My name is Ralph Capitelli. I represent Chris Cozad.

Just so the record will be totally clear on this point, you were not present at any of the conversations that you have testified to so far in this hearing, is that correct?

A. I was not present at any of the conversations that were made person to person. I did overhear the telephone conversations that we recorded.

Q. Okay, but what you have overheard or what you overheard are the same tapes that we have been provided in the defense that would have been presented in the case in this matter, is that not correct? I mean the tape recordings that we have are recordings of what you and the other agents heard –

A. That's correct.

Q. – of these conversations. Now, in connection with the conversations, the first conversation, I presume you are familiar with all the conversations and tapes in this matter, is that correct?

A. Well, I have listened to them numerous times, but I think we probably have about 20 tapes, so I won't be able to recall individual conversations on each tape.

Q. But it is accurate to state that in the very first conversation on October 16th between the informant and Mr. [p. 12] Yeager the person who introduces the entire idea of the possibility of four or five kilos is the confidential informant and not Mr. Yeager, is that not correct?

A. That's correct.

Q. Were those his instructions?

A. Yes.

Q. And the amount that is referenced or possible as indicated by Mr. Yeager in that initial conversation is a smaller quantity of one or two kilos, is that not correct?

A. Yes, Mr. Yeager said that there was already one kilogram in town and that they were trying to sell that one.

Q. And that was on October the 16th, correct?

A. I believe that's correct.

Q. And the next conversation, October the 20th is between Mr. Yeager and the confidential informant and they talk about a deal in four to five days which – and that the drugs are in town, but that doesn't take place either, does it?

A. Well, this is the same, on this conversation they are talking about that same kilogram that Mr. Yeager's source has in town and he is still trying to get rid of and I believe in that conversation is when Mr. Yeager says it won't be around but for about another day and then there were some more conversation.

Q. But the reference to the conversation dealing with the remaining deal going down between four or five days on October [p. 13] 20th, that, in fact, does not take place, correct? The deal does not go down until November the 2nd?

A. Yes, there was – The informant asked, how long would it take to get four or five in town. Mr. Yeager replies three or four days and that was on October the 20th, but that – like you said the actual deal didn't go down until November the 2nd.

Q. When the money is presented in the Security Center, the money is not counted at the Security Center by anyone, that's my understanding, is that correct?

A. It was not counted by the informant or Mr. Yeager. Mr. Yeager did thumb through the money and we could hear them discussing the money about what the

denominations were, whether the bills were marked, things like that.

Q. And that, that you presented $147,500. That's what the DEA counted and Mr. Yeager and the confidential informant were the two at the Security Center and they do not count the money?

A. That's correct.

Q. And, so, the government had presented the money sufficient for a five kilo deal; yet, as you indicated on November 2nd slightly less than two kilograms are what are actually presented and what are culminated in that – in the deal on November the 2nd, is that not correct?

A. Yeah, that's correct.

Q. Now, in terms of the conversations, it's my understanding that the only two conversations that Chris Cozad is on is the [p. 14] phone conversation on October 31st and the conversation that the DEA generated with the cooperation of Mr. Yeager on November 2nd, is that not correct?

A. Yes, and there was one other conversation, when Mr. Cozad, Mr. Yeager and the informant met at Mr. Yeager's house when the dummy package arrived there was a recorded conversation.

Q. Are you certain of that, that that conversation was recorded?

A. Yes, I am.

Q. Do you have a number on that conversation? Because all the conversations that I have been provided

do not provide a conversation that is face to face between Mr. Cozad, Mr. Yeager and the informant?

A. It was a Kel tape recording. I don't have the number, the exhibit number with me here.

MR. CAPITELLI: Okay, that could be significant, Your Honor, because in the preparation for this I have been informed all along that the only two tapes of my client were on the day of the arrest and a phone conversation that was referenced and that this conversation was not taped.

MS. DARROW: No, I never made any such representation of that to Mr. Capitelli, Your Honor. I provided him with all the tapes that I received and I did not set down which tapes were Mr. Cozad's.

MR. CAPITELLI: Well, in reference to preparation, [p. 15] Your Honor, I went down the number N1 through N3, 4, 5, 6, I asked her if there was an N7 tape, you said, no. I went to N8 and 9 and 10, 11 and 12 and 13, I asked if there was an N14 or N15 –

MS. DARROW: N7, 14, and 15 Your Honor were video tapes which have no audio on them and that is not what the agent is referring to. A video tape and a Kel tape are two very different things.

THE COURT: Do you have records of having given –

MR. CAPITELLI: Do you have the Kel tape?

THE COURT: – Mr. Capitelli and Mr. Schwabe the tape with respect to the conversation when the dummy package was delivered?

MS. DARROW: Your Honor, we can go through the list, the exhibit list, and pick out which one it is.

THE COURT: All right. Why don't we do that, so the record's clear that they were provided with the tape.

MS. DARROW: Okay, one second, please, Your Honor. I believe the agent has the file which shows –

THE WITNESS: I may have to stand down, Your Honor.

THE COURT: Sure.

MS. DARROW: That would be N11.

THE COURT: The number of the tape is N11.

MR. CAPITELLI: N11. Is that –

THE COURT: All right, do you have it?

[p. 16] MR. CAPITELLI: – referencing that as a very poor quality tape, is that correct?

THE WITNESS: Yes –

BY MR. CAPITELLI:

Q. It's extremely poor quality tape?

A. It was virtually useless.

Q. Virtually useless, okay, but, so we can reference that tape, but that face to face meeting, just so that the record will be totally clear. The tape is virtually useless and what you heard was not discernible in any real manner, is that correct?

A. Just bits and pieces. I could make out Mr. Cozad's voice, but –

Q. Nothing.

A. – not much of the conversation.

Q. But it's fair to say, as you have indicated that that conversation – that particular conversation so we can move on, that conversation there was absolutely no reference to the five – that dealt with the dummy package and the two kees, in N11, there was no reference to five kilograms, is that not correct?

A. That's correct.

Q. Okay. So, now, in the two conversations that we can hear on Mr. Cozad which are, let me see N22 which is the date of the arrest and October 31st which is N12 the conversation after [p. 17] this conversation that cannot be heard. In N12 which is on October 31st, the day you talked about, that phone conversation again deals with the two kilogram and what can happen in terms of the transmittal of money for that two kilogram and not the five kilogram, is that not accurate?

A. Yes, in that conversation they were just discussing about how the deal was going to take place, who was going to show the money, who was going to let us see the cocaine, there was no discussion of the amounts.

Q. Okay. And in the final conversation on – which is labeled N22, which is the date of the arrest of both Cozad and Yeager, on November the 2nd at that time you had placed Yeager under arrest and Yeager was cooperating with the DEA in making that phone call, correct?

A. Yes, sir.

Q. That phone call was made at the direction and under the instructions of the DEA, with the cooperation of Mr. Yeager?

A. Yes.

Q. And in that conversation to Mr. Cozad there is absolutely no reference to the additional three kilos, is that not correct?

A. No, this conversation just centered around how the money was supposed to get in Mr. Cozad's hands. That was the topic of the conversation.

Q. But there was no reference of the additional kees, is that [p. 18] not correct?

A. That's Right.

Q. Now, in terms of the additional quantity there was no specific date or time set up for the culmination of those remaining three kees, is that not correct?

A. Nothing other than the term next week.

Q. General conversation.

MR. CAPITELLI: One moment, Your Honor.

I will tender to co-counsel, Your Honor.

THE COURT: All right.

FURTHER CROSS EXAMINATION

BY MR. SCHWABE:

Q. Agent Kiger, my name is Gary Schwabe and I represent Mr. Yeager here today, just to sort of follow-up

on what Mr. Capitelli had asked you, to make it perfectly clear the amount that was ultimately produced by Mr. Cozad and Mr. Yeager was 1.96 kilograms, is that correct?

A. I don't have the lab report in front of me.

MR. CAPITELLI: Your Honor, that's in the record of the Probation Department and I had asked the government for a stipulation that the actual amount is 1.969 kilograms.

MR. SCHWABE: The amount produced.

MR. CAPITELLI: The amount produced.

MS. DARROW: We would stipulate, Your Honor.

THE COURT: All right.

[p. 19] BY MR. SCHWABE:

Q. I believe, I viewed a video tape, Agent, of a – of Mr. Yeager and the CI, Mr. Vaughn, going into a lock box or security office at one point, is that correct?

A. That's correct.

Q. And that's where Mr. Vaughn allegedly showed cash to Mr. Yeager?

A. That's correct.

Q. And you all had placed cash there sufficient to do a five kilo deal, is that correct?

A. Yes, sir.

Q. And, yet, what was ultimately produced was only 1.9 kilograms, is that correct?

A. That's correct.

Q. I want to draw your attention now, I believe the majority of the discussions that were brought out in concerning the tapes were adequately handled by Mr. Capitelli, but what I would like to do is speak with you about Edwin Yeager for a minute. Yeager spoke with the CI through out, correct?

A. Yes, sir.

Q. He – Your investigation revealed that the source of cocaine was not Mr. Yeager though, isn't that correct?

A. That's correct.

Q. The actual source of the cocaine was the co-defendant?

A. That's right, Mr. Cozad.

[p. 20] Q. Yeager was little more than a salesman or middleman, is that correct?

A. Yes, a broker.

MR. SCHWABE: One moment, Your Honor.

No further questions, Your Honor.

THE COURT: Ms. Darrow.

REDIRECT EXAMINATION

BY MS. DARROW:

Q. Agent Kiger, the conspiracy, the agreement was for the ultimate delivery of how many kilograms?

A. Five kilograms.

MS. DARROW: No further questions.

THE COURT: Let me ask you Agent, with respect to the 1.96 kilograms actually delivered, was that supposed to be the two kilograms?

THE WITNESS: Yes, ma'am.

THE COURT: That was supposed to be the initial delivery?

THE WITNESS: Yes, ma'am.

THE COURT: All right. Thank you. You may step down.

MS. DARROW: Your Honor, the government has no further witnesses.

THE COURT: All right.

MR. SCHWABE: Your Honor, the defense would call Edwin Yeager to the witness stand.

[p. 21] EDWIN YEAGER, DEFENDANT, SWORN

THE CLERK: For the record, please state your name and spell it

THE WITNESS: Edwin Yeager, Y-E-A-G-E-R, Jr.

DIRECT EXAMINATION

BY MR. SCHWABE:

Q. Edwin, do you recall the events of October and November of '92 that has been testified here today?

A. Yes, I do.

Q. What were your dealings with Doug Vaughn, the confidential informant, in this case?

A. Oh, he approached me to get him some cocaine.

Q. Had you known him before?

A. Yeah, about three years.

Q. Had you ever had any dealings with him in this sort before?

A. Some years back, yeah.

Q. All right. What was the initial quantity involved in this transaction?

A. What did he ask for or –

Q. Well, what did you – How did it start out, yeah, how did it – what do you –

A. Well, first he asked me if I could help him out, that he was short of funds if I could help him get some cocaine.

Q. What did you say?

A. I said, yeah, I will see what I could do and we talked [p. 22] later.

Q. Did he ever mention quantities to you?

A. As it went on he said, do you think you could get me five. I said, man I don't know if I could get you five. I really don't know. And then we talked again, I said, look I could get you one and then I could get you two, if we ended up with –

Q. Who was going to be the source of this one or two kilograms that you could get for them?

A. Chris Cozad.

Q. Had you ever known Cozad before?

A. Oh, yeah, I knew him, seen him around.

Q. What was the greatest quantity that you knew Cozad to move in the past?

A. One.

Q. One what?

A. One kilo.

Q. He had never moved two? He never moved five before? Did the CI seem satisfied with this amount of cocaine?

A. With the two or the one?

Q. Yeah, the one or the two?

A. He just seemed like he kept always pumping up to get to the five. I mean he took what he could get, but it just seemed like he kept pumping up to the five all the time.

Q. Did there ever come a time when you told him you would see what you could do or that you would try or –

[p. 23] A. Oh, yeah, yeah, I told him that just to keep him around, he just – like I said he kept pumping us all, I just said, yeah, okay, yeah, I will see what I could do.

Q. Why would you say that?

A. Just to keep him around

Q. For what reason?

A. To make the transaction for the one or two.

Q. You didn't want to break a deal?

A. No, didn't want to get – right, we had already committed.

Q. Did there ever come a time when you talked with your source here, Mr. Cozad, about this operation?

A. Yeah, in the beginning I mentioned it to him and he said, no, no way, wouldn't do it and couldn't do it.

Q. Edwin, I am going to ask you this last question, was there ever any serious intent about you moving a quantity of five kilograms?

A. No, no there wasn't.

Q. Could you have moved –

A. No, no, sir –

Q. – five kilograms?

A. – not at all, not at all.

MR. SCHWABE: Nothing further, Your Honor. I don't know – Mr. Capitelli would like to follow-up if that's permissible.

THE COURT: Sure.

MR. CAPITELLI: Just one or two questions if I might, Your [p. 24] Honor.

FURTHER DIRECT EXAMINATION

BY MR. CAPITELLI:

Q. Mr. Yeager, in connection with the phone conversation that you made on November 2nd, that was right after your arrest in your home.

A. Right.

Q. Is that not correct?

A. That's right.

Q. And you did that at the request of DEA, to assist DEA?

A. Yes, sir.

Q. And, isn't it a fact that the DEA basically told you what to say on that conversation?

A. Yes, yes.

Q. Did you say anything about the additional kilos or when that or when an additional deal could be culminated for additional kilos?

A. No, sir.

Q. And that is not referenced at all, correct?

A. No, sir.

Q. And the DEA was guiding you on that conversation?

A. Exactly.

MR. CAPITELLI: Thank you.

CROSS EXAMINATION

BY MS. DARROW:

[p. 25] Q. Mr. Yeager, you said you just wanted to keep the confidential informant around, correct?

A. Yes.

Q. So you could give him two the first time and then sell him some more the next time and get up to the five kilograms, isn't that correct Mr. –

A. I didn't even want to do the two to begin with. He pressured me into doing it for him and I did the two for him and that was it.

Q. You were willing to do one?

A. One?

Q. That's right.

A. I was willing to do what I had, yes.

Q. Correct, what you had and what Mr. Cozad had, correct?

A. Right.

Q. You also told him that it would take about three or four days to get more up from Miami, correct?

A. Just telling him that. I could not produce five.

Q. Well, the one got sold though, correct?

A. Oh. I don't know.

Q. You don't know?

A. No.

Q. But that's not the one – that one wasn't part of the –

A. I don't know.

Q. Excuse me, sir. That one was not part of the two that were [p. 26] delivered on November 2nd, correct?

A. I don't know. I don't know that.

Q. Well, you recall –

A. All I know is what I received.

Q. You recall your conversations earlier in October where you said there was one and that was going to go soon?

A. Yeah, yeah.

Q. And then November 2nd, two kilos came up, correct?

A. Right.

Q. And, in fact, those came up in a rented car from Miami which had been rented not in the middle of October, but right before the delivery, correct?

A. Oh, I don't know that.

Q. Okay. And at no point in time did you say I can't do five. I can only give you one, correct?

A. No, no.

Q. That's not correct?

A. I didn't tell him that.

Q. Okay. And you wanted to keep him around because you knew that you and Mr. Cozad could continue to get kilogram sup from Miami –

A. No.

Q. – and you could ultimately give him the five, correct?

A. That's not what –

MR. SCHWABE: Objection, Your Honor, this is [p. 27] speculation about possibilities and hopes and dreams of the DEA. There has been no evidence to suggest they could present five kilograms.

MS. DARROW: I object to that. They – He agreed to give them five.

MR. SCHWABE: Object.

MS. DARROW: That was on tape. Mr. Schwabe, you have heard the tapes.

MR. SCHWABE: Your Honor, we object to that characterization. He's explained what he meant by that already on direct. We have nothing further.

THE COURT: All right, let's move on.

BY MS. DARROW:

Q. Mr. Yeager, on October 26th, 1992 you went to the Security Center with the confidential informant to see the money, correct?

A. Right.

Q. How much money did you understand was in there?

A. Just what he told me. He said there was enough.

Q. Okay. And you said for four, right? And he said, no, five?

A. Oh, I don't remember what exactly I said. I knew – He showed me the money that was there.

Q. Okay. If I told you that the taped conversation from that date said that the confidential informant said for five, would [p. 28] you accept that?

A. I don't remember. Yeah, if he said that.

Q. Okay. And you said –

A. But I still couldn't produce the five.

Q. You told him, I got it?

A. No.

Q. You never said, I got it?

A. Maybe, I did, but I still didn't have it?

Q. But you conspired –

A. I just –

Q. – with him for the delivery of five kilograms, did you not?

A. Well, ma'am he just kept asking me for five continuously. I wasn't going to give him five. I didn't have five. I had two. I gave him the two and that was going to be the end of the dealings with him.

Q. That's not what you told him though, is it?

A. That's not what he told –

MR. CAPITELLI: Objection, it's argumentative at this point, Your Honor.

MR. SCHWABE: Objection.

BY MS. DARROW:

Q. Sir, did you tell him that you would give him the two and next week you would give him the rest of it?

A. Did I tell him like that? I don't know, did I, yeah.

[p. 29] MS. DARROW: No further questions.

THE COURT: All right, you may step down.

MR. SCHWABE: Your Honor.

THE COURT: I am sorry, Mr. Schwabe.

MR. SCHWABE: I just have a brief redirect here if I might.

REDIRECT EXAMINATION

BY MR. SCHWABE:

Q. That conversation at the little warehouse or wherever it was with the safety deposit box, the DE – I mean the confidential informant indicated to you that he had enough money for five kilograms?

A. Right. He said there was more than enough. That's what he told me.

Q. So you knew based on that or you knew that he had that quantity?

A. Yes, of funds.

Q. And so it would have been safe to have produced five, if that were possible?

A. Right.

Q. And yet all you produced was what you were capable of producing, which was what?

A. One, nine something under two kees.

MR. SCHWABE: I have nothing further Your Honor.

[p. 30] RECROSS EXAMINATION

BY MS. DARROW:

Q. Excuse me. Mr. Yeager, did you know it was under two kees on the date of the deal?

A. No.

MS. DARROW: Thank you.

THE DEFENDANT: I just got what I had.

THE COURT: All right. You may step down.

MR. CAPITELLI: One moment Your Honor. I would like the call Mr. Cozad to the stand Your Honor.

CHRISTOPHER COZAD, DEFENDANT, SWORN

THE CLERK: For the record, please state your name and spell it

THE WITNESS: Christopher Cozad, C-O-Z-A-D.

DIRECT EXAMINATION

BY MR. CAPITELLI:

Q. Mr. Cozad, did you, in fact, deliver the two kilograms that are in question in this case?

A. Yes, I did.

Q. And at any time, did you have any agreement with anyone to deliver additional kilos?

A. No, I did not.

Q. In fact you have listened to all of the tape recordings that have been provided to us by the government, is that not correct?

[p. 31] A. Yes, sir, that's correct.

Q. In particular the two conversations that we have been referencing with on the day or the Saturday before the transaction and after the transaction, have you reviewed those?

A. Yes, sir, I have.

Q. And additionally, do you have an independent recollection of those conversations?

A. Yes, I do.

Q. Is there any reference whatsoever to additional kilos in either of those two conversations?

A. No, sir, not so whatsoever.

Q. And those are the only two conversations that you were on, is that not correct?

A. To my knowledge, that's correct.

Q. Other than the conversation that was referenced N11, which is inaudible?

A. Yes, sir.

Q. And in that conversation, as the agent testified, was there any reference at all to additional kilos when you – with you present?

A. No, sir.

Q. Were you capable of producing more kilos?

A. No, sir.

Q. Did you, in fact – Strike that. At any time, was it ever your intent to produce more than the package for the two kilos [p. 32] that was presented on November the 2nd 1992?

A. No, sir.

MR. CAPITELLI: Thank you.

MR. SCHWABE: Nothing, Your Honor.

CROSS EXAMINATION:

BY MS. DARROW:

Q. Mr. Cozad, is that the only time you ever had two kilograms in your possession in New Orleans, Louisiana in 1992?

MR. CAPITELLI: I am going to object to that Your Honor. The relevancy, if she can say in connection with this deal. If she is going to reference prior to that I

think it's an improper question for several reasons. One, it's irrelevant to this hearing as to any quantities he had before the date of this, in terms of being able to be computed which is the sole issue here, what should be computed or included in the cost determination, to go before this Your Honor we chose to come here, to plead, to accept guilt and to narrow this issue, for her to get into what may or may not have occurred before I believe is irrelevant to this hearing Your Honor.

MS. DARROW: Your Honor, the defendant said he couldn't produce more.

THE COURT: I think the issue is whether he is capable of being the source for additional drugs and so to that extent it is relevant.

MR. CAPITELLI: Note my objection.

[p. 33] THE DEFENDANT: Could you repeat the question, please.

BY MS. DARROW:

Q. Did you ever have any additional kilograms of cocaine in your possession in New Orleans in 1992 beyond those two kilograms?

A. No, ma'am, I did not.

Q. So, when Mr. Yeager testified that you had one kilogram earlier in October that was not true?

A. I don't specifically hear him referring specifically to me. I am just referring on the tapes saying that he had one, not one from me. And, no, I did not have that one. I don't know. I have no idea what he is speaking of in that conversation.

Q. Mr. Cozad, who was your source for that deal?

MR. CAPITELLI: Objection, Your Honor. That is totally irrelevant to this hearing.

THE COURT: Well, it might be. It might not be. The whole issue is whether he is capable of providing the additional cocaine, the additional three kilograms.

MR. CAPITELLI: Your Honor, I believe, that to bring a – The government has talked about the possibility of bringing my client before a Grand Jury and talking who the source was which would be the proper – to do this in open court and ask who the source of drugs is in open court you are under government – The government has speculated who it is, but I think it is totally improper and beyond the – what [p. 34] relevance is the source of the drugs to the amount. I don't believe that that – I don't believe that that controls the amount in this case who the source of the drugs is, your Honor. And, I also think it places any client in jeopardy for future cooperation with the government by doing it in this manner.

THE COURT: Perhaps open court is not the appropriate forum, if you would like to move to have the courtroom closed?

MS. DARROW: I would so move, Your Honor.

MR. CAPITELLI: One moment, Your Honor.

May we approach the bench Your Honor?

THE COURT: Sure.

(At side bar on the record)

MR. CAPITELLI: Your Honor, the problem is what's going on here is that the government has said and she has just said it in the hearings down in Magistrate Court that they believe the source is his brother in Florida Your Honor. And that puts whether or not the government wants to put him in Grand Jury and whether he wants to – have him – make him testify against his brother. It's a different issue. They are trying to accomplish that here in the courtroom whether it is open or not puts him in a position to force him and trying to put him in a contempt situation, Your Honor, for trying to say that his brother is or, you know the Court could consider, you know, that issue from the government saying in the record they believe the source is the brother.

[p. 35] THE COURT: It's in the PSI.

MR. CAPITELLI: It's in the PSI. The court can consider that for this [sic] purposes, but to put him here in a contempt situation if the government wants to do that in Grand Jury they have already threatened that they are going to do that next and I expect they will, but to do it here in this hearing I really believe that it is – it's unfair. It's setting a I think a really unusual precedence for the government's "cooperation". I would like to think that the option would still be open to me after this day I presume it's not going to be open to me if we permit, permit it to go forward in this type of procedure and I really would ask the Court to reconsider the ruling on this issue of who provided drugs in light of it is already in the record, that the government is already going to argue and what my client has already said he doesn't wish to testify against his brother.

MS. DARROW: Your Honor, what I am trying to get at is intent. The defendant is up here saying he had no intent to distribute any more than the two kilograms. I have been trying to move around to pierce holes in that statement, because I personally don't believe it's credible and that's the reason for asking. I guess we are more or less getting into argument, but how can someone suddenly have two kilograms and never have any quantities prior in the year. It doesn't just pop up.

MR. CAPITELLI: It's not popping. It's not [p. 36] possession.

THE COURT: Well, unless you have some information to impeach him with, then that's the record.

MR. CAPITELLI: How long is it going to be, the investigation is faulty and doesn't provide the answer to all of these other questions. That's argument.

THE COURT: Do you wish to pursue this, or do you want to move onto something else.

MS. DARROW: I would like to pursue it, if not I have other questions to move on to.

THE COURT: The only information I would think that would be forthcoming would something that has already been provided to me which is in the PSI report. That the likely source of the cocaine is the defendant's brother in Florida, is that correct?

MR. CAPITELLI: That's the issue that's before the Court, yes.

THE COURT: And the witness has already testified that rightly or wrongly that he didn't – was not in

possession of any other cocaine during the calendar year, so I don't know what other information we could get, unless you have – unless you can tell me something else Ms. Darrow that you think would be forthcoming and would be helpful to the Court.

MS. DARROW: I am trying to think.

THE COURT: Take your time.

[p. 37] MS. DARROW: I can defer to the Grand Jury I am in a peculiar situation because Mr. Cozad is also at the bar which –

MR. CAPITELLI: Your Honor, I would like to object –

MS. DARROW: Of course –

MR. CAPITELLI: This is not the Cozad brother obviously.

THE JUDGE: I know it's his brother.

MR. CAPITELLI: Yes.

THE JUDGE: Not the brother in Florida.

MS. DARROW: No, absolutely not the brother in Florida.

MR. CAPITELLI: I am just saying that that's the proper thing to do that, for this purpose.

MS. DARROW: Okay, what I am pondering right now is going back to put – Ralph, of going to where we have had actual seizures of cocaine that was addressed to your client in prior years, that came from Miami from his brother, so if he says, and forget even his

brother, but we have had seizures in the past and although not 1992 I am considering going back to see if he had any cocaine in '92 besides these two kilos.

MR. CAPITELLI: Okay, what I am saying to you is that in terms of, in terms of relevancy for this computation I don't think it can go in and I know in the amounts that you are talking about because we talked about them on less than a [p. 38] kilogram and what we are talking about is not in connection with this hearing. It is not in –

THE COURT: Well, the issue before the Court is the issue as to whether the defendant is capable of producing more.

MR. CAPITELLI: Producing more. And our position is he isn't.

THE COURT: And that is what he said, he could not do –

MR. CAPITELLI: Could not do.

THE COURT: But, the information provided on the tape recording by Mr. Yeager indicates that there was an agreement to produce more and so if the government has some information with respect to this capability issue, then I think that's relevant. At that point it's almost an impeachment situation which is perfectly –

MR. CAPITELLI: You can cross examine at a specific action, that's true of my company. That's a different issue.

THE JUDGE: All right.

MR. CAPITELLI: So, do you want to get into that?

THE JUDGE: So if you want to pursue –

MS. DARROW: Can I have one second to talk to my Agent.

THE COURT: Sure.

MS. DARROW: Well, he things it relates to his client. I don't know what the consequence, I have never come across [p. 39] this, but is it possible for the government to withdraw 5K function?

MR. SCHWABE: I don't believe – I have never run across that, there is a possibility I think everyone has been truthful, everyone here today –

THE COURT: The fact that the government finds the – has no bearing on my sentencing. In any event, I take it into consideration information that is provided, but it's not binding on me. If the government wants to withdraw it, that's – that's your prerogative.

MS. DARROW: Okay.

THE COURT: Unless there is some case saying that you can't, but for this particular – I know –

MS. DARROW: Since there has been no ruling on the motion.

THE COURT: Exactly. And I was not going to – I was not going to grant your motion to depart. So apparently it has little effect on – I was considering the information. I am considering the information that he did cooperate with the government. That is something that the sentencing Judge takes into consideration.

MR. SCHWABE: If the government wanted to get this information out of the way and he was smart enough to ask, ask him if he is ready to set up the next deal next week, if that would do it. If we didn't have it on tape we wouldn't be here [p. 40] right now.

MR. CAPITELLI: That's exactly it.

MS. DARROW: Well, if it was a perfect world everything would be perfect, but – it didn't.

MR. CAPITELLI: We have a lot of argument about this, Your Honor, that I think would assist the Court as to – Your Honor, it may assist the court, but certainly if she has got other stuff she wants to cross examine on he stands ready to be.

MS. DARROW: If I can talk to my agent for a moment.

THE COURT: Sure.

BY MS. DARROW:

Q. Mr. Cozad, did you have any quantities of cocaine that you received and distributed during 1992?

A. No, ma'am.

Q. Did you ever receive any shipments of cocaine in, say from 1988 through 1992?

MR. CAPITELLI: Now, I am going to object, Your Honor, as she went through the whole year of 1992 and now she is back in 1988 to try to put that in a sentencing hearing and to have relevancy in this Court's determination of whether he can produce five kilograms

of cocaine in December – November, December of 1992 and saying, well, if you got something back in 1988.

MS. DARROW: Your Honor.

[p. 41] MR. CAPITELLI: I think that's totally irrelevant and goes beyond anything that could assist this Court Your Honor.

MS. DARROW: My goal is to show capability. That he did have receipts or did receive cocaine at various times over the years and so the two kilograms in 1992 was not the only quantity in 1992 and was not a once in a lifetime fluke

THE COURT: Overruled

THE DEFENDANT: Could you repeat the question, please?

BY MS. DARROW:

Q. From 1988 through 1992, did you ever receive quantities of cocaine by mail?

A. To the best of my knowledge, never.

Q. Did you ever attempt to receive quantities of cocaine by mail?

A. Did I ever attempt?

Q. Attempt.

A. Not to my knowledge, no.

Q. In 1989, sir, did you not ask a friend of yours by the name Brett Boulmay to go to the post office, pickup a package addressed to you from your brother in Miami which contained over an ounce of cocaine?

A. This is all new to me I don't –

Q. So you never asked Brett Boulmay to go to the Post Office to pickup a package for you in 1989?

MR. CAPITELLI: I am going to object to that Your [p. 42] Honor. Now, we find in 1989 she is talking about a delivery of one ounce of cocaine and that's what she has to – I think that's totally irrelevant to a determination of eight in 1992 when he delivered three – five kilograms.

THE COURT: Do you have anything else?

MS. DARROW: No, Your Honor.

MR. CAPITELLI: Nothing further, Your Honor.

THE COURT: all right. You may step down.

THE DEFENDANT: Thank you.

THE COURT: All right, with respect to the objections that were raised by Mr. Cozad and Mr. Yeager, with respect to Paragraph 19 of the PSI both the defendant Cozad and Yeager contend that the Probation Officer erred in basing their base offense levels on a transaction involving five kilograms of cocaine as opposed to the 1.691 kilograms of cocaine that were actually received by the agent from defendant Yeager.

The application notes to Section 1B 1.3 of the sentencing guidelines provide that conduct that is nor [sic] formally charged or is not an element of the offense may enter into a determination of the applicable guideline range provided it is within the perimeters of the relevant conduct. In addition Comment 1 to Section 2D 1.4 of the

sentencing guidelines provides that the weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount. However, where the court finds that the defendant did not intend to produce and [p. 43] was not reasonably capable of producing the negotiated amount the court shall exclude from the guideline calculation the matter that finds the defendant did not intend to produce and was not reasonably capable of producing.

The Court finds that the defendants were capable of producing and did intend to produce the five kilograms of cocaine.

The Court finds persuasive the testimony of Agent Mark Kiger as to the negotiations, the discussions of the five kilogram [sic] and the transactions between the confidential informant, Mr. Yeager and Mr. Cozad.

Therefore the motion is denied.

MR. CAPITELLI: Please note my objection, Your Honor. And specifically –

THE COURT: All right.

MR. CAPITELLI: I wish to have it noted that I believe, the Court applied the burden of proof of beyond a preponderance for this rather beyond a reasonable doubt which is, if I am correct, did you, did the court apply the burden of beyond a reasonable doubt in the determination made just now that there were five kilos?

THE COURT: What?

MR. CAPITELLI: Clarification, which burden of proof did the court apply in making it's determination that there were actually five kilos or –

[p. 44] THE COURT: That they were reasonable – the issue is whether they were reasonably capable of producing.

MR. CAPITELLI: Yes.

THE COURT: And that's information that I have to asses. [sic]

THE COURT: All right, would Mr. Cozad and Mr. Yeager, please step forward.

MR. SCHWABE: Yes, Your Honor, and just for the record, Your Honor –

THE COURT: Yes.

MR. SCHWABE: For purposes of any possible appeal Mr. Yeager would also note an objection to the findings.

THE COURT: I understand. And your objections are in the record.

MR. SCHWABE: Thank you, Your Honor.

Your Honor, there is one other matter on Mr. Yeager's behalf which we haven't had a chance to argue it, it was and I did bring it up briefly with Agent Kiger earlier and it was pointed out to the court that Mr. Yeager was the salesman or the broker I think was the actual word that Mr. Kiger used. Mr. Yeager was not the source and we had requested a downward departure for someone less culpable than the other participants in this offense. The

only participants we have is the actual source and some other entity and then Mr. Yeager and we have requested a downward, a two level reduction for his role as [p. 45] being less culpable than the other participants.

THE COURT: I don't find that he has a minor role in the transaction.

What is the government's position on the 5K letter, the 5K Motion that was filed.

MS. DARROW: Your Honor, the government did agree with defense that they would file a 5K Motion. I believe, it sets out the limited extent of the defendant's cooperation.

THE COURT: All right. The government has filed a Motion for downward departure pursuant to Rule 5K 1.1 with respect to Mr. Yeager recommending a two point downward departure to a level of 27 with guideline imprisonment range from 78 to 97 months.

The Court declines to depart, but does acknowledge the Motion and does acknowledge Mr. Yeager's cooperation which will be taken into consideration with respect to the selection of the imprisonment term.

Mr. Cozad, do you have anything to say before sentence is imposed?

MR. COZAD: No, Your Honor.

THE COURT: All right. This matter is before the court for sentencing. The Pre-sentence Investigation Report has been prepared pursuant to Rule 32 Federal and Criminal Procedure. The Court understands that the

government and the defendant have considered the contents of the report and have [p. 46] had an opportunity to state any objections thereto.

The Court adopts the Probation Officer's recommended findings of fact as to which there is no objection and as to the controverted findings of fact resolves the dispute as follows: The defendant notes that Paragraph 9 and 40 of the PSI contain clerical errors. Paragraph 9 should read that "Yeager informed the CI (cooperating individual) that his source wanted to sell two kilograms of cocaine," not purchase two kilograms of cocaine. Paragraph 40 should read that "The defendant was first arrested on October 5, 1991" and not October 5, 1987.

The defendant's objection regarding the date of his marriage in Paragraph 40 is not material to the court's determination of defendant's sentence, but is noted for the record.

The defendant's objection to Paragraph 17 which provides that he made a statement that, "he was going to make more money off of the drug deal than Yeager." The Court finds that whether or not the statement is made is irrelevant to the court's determination of the defendant's sentence, but notes the objection for the record.

The defendant objects to the allegations of his ex-wife regarding his drug usage and chronic unemployment. Again the Court finds that the objection to be irrelevant as to the Court's determination of the defendant's sentence, but notes it [p. 47] for the record.

The defendant has also noted that he would have been willing to assist the Probation officer in verifying his

previous employment. Again, the Court finds the defendant's employment verification to be irrelevant to the Court's determination of defendant's sentence, but defendant's point is made for the record.

The question of guideline application has arisen with respect to Paragraph 19 and I have ruled on that after hearing the testimony from the Agent this morning.

Accordingly the court determines that the applicable guideline ranges are as follows; 97 to 121 months imprisonment, four to five years as supervised release, $15,000 to a $4,000,000 dollar fine; $1,492 dollars per month cost of imprisonment; $115.30 per month cost of probation or supervised release; $991 dollars per month cost of community confinement. Restitution is not applicable in this case.

Refer to the Sentencing Reform Act of 1984. It is the judgment of the Court that the defendant, Christopher Cozad, is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 105 months as to Counts 1 and 2 to be served concurrently. Upon release from prison the defendant shall be placed on supervised release for a term of four years. The term consists of terms of four years on each of Counts 1 and 2, all such terms to run concurrently. Within 72 hours of [p. 48] release from the custody of the bureau of prisons the defendant shall report in person to the Probation Office in the district in which the defendant is released. While on supervised release the defendant shall not commit another state, federal or local crime and shall comply with the following special conditions; Number 1, that the defendant shall participate in a program of testing and/

or treatment for drug abuse as directed by the Probation Officer, until such time as the defendant is released from the program by the Probation Officer.

Number 2, that the defendant permit the United States Probation Officer to conduct searches and seizures of concealed contraband from the defendant's person and in any building, vehicle or other areas under the defendant's control at such times as the United States Probation Officer shall decide.

Court finds that the defendant does not have the ability to pay a fine. The court will waive the fine in this case. It is further ordered that the defendant shall pay to the Clerk's Office $100 dollars as a special assessment fee as to Counts 1 and 2 which is do [sic] immediately.

It is further ordered that the defendant surrender himself at the institution designated by the Bureau of Prisons by 12:00 noon on June 22nd, 1993.

MR. CAPITELLI: Your Honor, I would ask for credit for time served and the time that he has served at a –

THE COURT: How much time was served?

[p. 49] MR. CAPITELLI: He served an initial few days, Your Honor, the only issue would be that I still would ask for is – his – he was in halfway house for some several months and then he has been under home monitoring and I would urge that that time be considered also as time served.

THE COURT: The home monitoring?

MR. CAPITELLI: Yes, Your Honor.

THE COURT: I will recommend that credit be given for the time served in the detention house.

MR. CAPITELLI: Okay, Thank you.

THE COURT: Mr. Yeager, do you have anything to say before sentence is imposed?

THE DEFENDANT: No, Your Honor.

THE COURT: All right. There are no objections as to the Probation Officer's recommended findings of fact and the court adopts the recommended findings.

A question of guideline application has arisen with respect to the recommendation contained in Paragraph 21 and 24 of the PSI The Court resolved these questions as provided hereafter and adopts the remainder of the Probation Officer's recommendations as disputed. For the reasons stated previously with respect to the Probation Officer's recommendations as to the quantity of cocaine used to determine the defendant's sentencing guidelines those objections are overruled.

As to the defendant's objection that the Probation Officer [p. 50] found that the defendant did not play a minor role in the offense the Court again concurs with the Probation Officer's finding and does not take into consideration this objection.

Yeager directly negotiated with the confidential informer with regard to the price and the amount of cocaine, met with the confidential informer on several occasions on behalf of Mr. Cozad. This does not represent the actions of a minor participant but rather one who played an important role in the offense.

The Court determines that the applicable guideline ranges are 97 to 121 months imprisonment, four to five years of supervised release, $15,000 to $4,000,000 dollar fine and the cost of imprisonment, probation, community confinement previously stated. Restitution is not applicable.

Pursuant to the Sentencing Reform Act of 1984 it is the judgment of the Court that the defendant Edwin Yeager is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 97 months as to Counts 1 and 2 to be served concurrently. Upon release form imprisonment the defendant shall be placed in supervised release for a term of four years. The term consists of terms of four years on each of Counts 1 and 2. All such terms to run concurrently. Within 72 hours of release from the custody of the Bureau of Prisons, the defendant shall report in person to the Probation Office in the district in which the defendant is released. While on [p. 51] supervised release the defendant shall not commit another federal, state or local crime and shall comply with the following special conditions; Number 1, the defendant shall participate in a program of testing and/or treatment for drug abuse as directed by the Probation Officer until such time as the defendant is released from the program by the Probation Officer.

Number 2, that the defendant permit the United States Probation Officer to conduct searches and seizures of concealed contraband on the defendant's person and in any building vehicle or other areas under the defendant's control at such times as the United States Probation Officer shall decide.

Court finds that the defendant does not have the ability to pay a fine and the court will waive the fine in this case. It is further ordered that the defendant shall pay to the Clerk's Office a special assessment fee of $100 dollars as to Counts 1 and 2 which is due immediately.

It is further ordered that defendant surrender himself to the institution designated by the Bureau of Prisons by 12:00 noon on June 22nd, 1993.

MR. SCHWABE: Your Honor, we would just echo Mr. Capitelli's request on the halfway house for the detention time served.

THE COURT: All right. I will make the same recommendation.

[p. 52] MR. CAPITELLI: And Your Honor, one final request, if I might – I know it's not binding on the department of prisons, Bureau of Prisons, but if the court would recommend Saufley Field or Tynsdell. The family would be – It would be in Florida. It would be the closest reasonable place for them to be able to visit. So I would ask the court to recommend those to the Bureau of Prisons either – Saufley Field in particular, one recommendation usually goes better. Saufley Field, S-O-F-T-L-E-Y.

THE COURT: I will make the recommendation.

MR. SCHWABE: Your Honor, we would make a similar recommendation that Mr. Yeager be placed as close to his family as possible, as well.

THE COURT: In New Orleans, you mean?

MR. SCHWABE: Well, I don't think that they would be able to do that, but they would have a facility that would be closer than say, Connecticut or other places where they would.

THE COURT: Yes, that's correct.

MR. SCHWABE: In other words as close to home as possible.

THE COURT: But his family is in New Orleans, not Florida?

MR. SCHWABE: That's correct.

THE COURT: All right. We will make that recommendation.

[p. 53] MR. SCHWABE: And in point of fact, Your Honor, Saufley Field or Pensacola would both be about as close as they could come.

THE COURT: All right.

CERTIFICATE

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/ Donna M. Shepherd-Gettys
Donna M. Shepherd-Gettys, CSR.

6/14/93
Date

APPENDIX F

PART D – OFFENSES INVOLVING DRUGS

1. UNLAWFUL MANUFACTURING, IMPORTING, EXPORTING, TRAFFICKING, OR POSSESSION; CONTINUING CRIMINAL ENTERPRISE

§ 2D1.1 ***Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy***

(a) Base Offense Level (Apply the greatest):

(1) **43**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or

(2) **38**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

(3) the offense level specified in the Drug Quantity Table set forth in subsection (c) below.

(b) Specific Offense Characteristics

(1) If a dangerous weapon (including a firearm) was possessed, increase by 2 levels.

(2) If the defendant unlawfully imported or exported a controlled substance under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import or export the controlled substance, or (B) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by 2 levels. If the resulting offense level is less than level 26, increase to level 26.

APPENDIX G

SENTENCING GUIDELINES

12. *Types and quantities of drugs not specified in the count of conviction may be considered in determining the offense level.* See *§ 1B1.3(a)(2) (Relevant Conduct). Where there is no drug seizure or the amount seized does not reflect the scale of the offense, the court shall approximate the quantity of the controlled substance. In making this determination, the court may consider, for example, the price generally obtained for the controlled substance, financial or other records, similar transactions in controlled substances by the defendant, and the size or capability of any laboratory involved.*

If the offense involved both a substantive drug offense and an attempt or conspiracy (e.g., *sale of five grams of heroin and an attempt to sell an additional ten grams of heroin), the total quantity involved shall be aggregated to determine the scale of the offense.*

In an offense involving negotiation to traffic in a controlled substance, the weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount. However, where the court finds that the defendant did not intend to produce and was not reasonably capable of producing the negotiated amount, the court shall exclude from the guideline calculation the amount that it finds the defendant did not intend to produce and was not reasonably capable of producing.